

BEFORE THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES

In the Matter of Mindy A. Hecker/Kenwood : Case No. 448-0
Forest Condominium II, Inc. :

DECISION AND ORDER

The above entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, as amended, and the Commission having considered the testimony and evidence of record, it is this 3rd day of January, 2000, found, determined and ordered as follows:

FINDINGS OF FACT

1. Complainant Mindy A. Hecker, is a unit owner in Kenwood Forest Condominium, II.

2. Respondent Kenwood Forest Condominium, II, Inc., is the governing body of Kenwood Forest Condominium II, a Maryland Condominium ("the Condominium") in Montgomery County with 279 units.

3. When Mindy A. Hecker purchased her condominium unit, it was already improved by a deck in the rear. The previous owner confirmed that original plans for the deck called for stairs to the ground level, but those stairs were never constructed because of reasons personal to the previous owner's needs.

4. On June 18, 1997, Mindy A. Hecker filed an application with the Condominium for approval of stairs leading down from her deck to ground level. The stairs would be constructed on property which is part of the general common elements of the Condominium.

5. Under its By-laws, Article X, Section 3, the Condominium is required to approve or disapprove applications for architectural changes or modifications within sixty (60) days of the submission of an application including complete plans and specifications for the requested change or modification. If the Condominium fails to take action to approve or disapprove the application within that time period, then approval "will not be required and the By-laws will be deemed to have been fully complied with". Article X, Section 3.

6. Mindy A. Hecker's application was approved by default as of August 17, 1997. However, Ms. Hecker did not start construction immediately and, in response to a subsequent request by the Condominium Board of Directors, Ms. Hecker submitted additional

information on September 17, 1997. If the submission of new material by Mindy A. Hecker on September 17, 1997 restarted the sixty (60) day time period, then her application again was approved by default as of November 16, 1997 by virtue of the Condominium's failure to take timely actions to approve or disapprove her application.

7. Under Article X, Section 4 of the By-laws construction or alterations in accordance with approved plans and specifications must be commenced within six (6) months following the date of approval by the Architectural and Environmental Control Committee. Under Article X, Section 2 of the By-laws, in the absence of this Committee the Board of Directors is to act in this capacity. Mindy A. Hecker did not commence construction of her stairs until June 1998. By that time the approval by default had expired.

8. On June 16, 1998, Mindy A. Hecker constructed the stairs on the general common elements notwithstanding that her approval had expired. Ms. Hecker testified at the hearing that she had contacted her contractor in late March or early April 1998, but that he could not install the stairs until June.

9. On June 26, 1998 the Condominium advised Mindy A. Hecker that she must remove the stairs. After the Board meeting of August 19, 1998, Mindy A. Hecker was assessed a fine of \$5.00 per day to commence on September 26, 1998. There was no testimony presented that the Board had conducted an evidentiary hearing.

10. In a letter dated September 17, 1998 to Ms. Hecker from the condominium manager, Ed Phares, Ms. Hecker was advised that the commencement of the fines was suspended. The parties were engaged in settlement negotiations at this time.

11. Following a subsequent Board request, Mindy A. Hecker obtained a permit for the construction of the stairs from Montgomery County, Maryland on October 9, 1998, 1998, after the stairs had already been constructed. The County's Department of Permitting Services issued an Inspection Approval for the stairs on October 20, 1998.

12. During the course of this dispute, the parties exchanged settlement offers. The Condominium proposed a settlement whereby Mindy A. Hecker could keep the stairs provided a covenant was recorded in the Land Records regarding the maintenance of the stairs and of the holly trees surrounding the stairs, and further that Mindy A. Hecker would pay all legal costs relating to the approval of the stairs. On February 1, 1999, this offer was rejected when Mindy A. Hecker through her counsel proposed modifications to that settlement. No settlement was ever consummated and no new application for approval was ever filed or acted upon.

13. The parties never reached a formal settlement of this dispute and on February 22, 1999 the Condominium withdrew all settlement offers and directed that the stairs be removed no later than 5:00 p.m. on March 26, 1999.

14. On March 22, 1999 Mindy A. Hecker requested a hearing in accordance with the provisions of the Condominium's By-laws, Rules and Regulations and the Maryland Condominium Act.

15. On March 31, 1999 the Condominium advised Mindy A. Hecker by letter that a hearing would be held at 7:30 p.m. on April 14, 1999. The Condominium also advised Mindy A. Hecker that the Board would consider a sanction, in the form of a daily fine of \$25.00, starting April 26, 1999, for failure to remove the stairs.

16. Initially, Mindy A. Hecker objected to the hearing date because she could not attend. She thereafter waived her objection and her attorney attended the hearing after it had been rescheduled to 7:30 p.m., April 15, 1999.

17. After the April 15, 1999 hearing before the Condominium Board of Directors, the Board voted to direct Mindy A. Hecker to remove the stairs no later than May 3, 1999. A fine of \$25.00 per day was imposed, to commence on May 4, 1999, until the stairs were removed.

18. On May 4, 1999 Mindy A. Hecker filed a Complaint with the Commission on Common Ownership Communities, thus suspending the assessment of, but not the running of, the fines.

19. The testimony at the hearing on November 17, 1999 was that at the rear of three of the units contiguous to and in the same line as Mindy A. Hecker's unit there are three decks with stairs leading down into the general common elements which are virtually identical in style and dimension to the stairs constructed by Mindy A. Hecker. Mindy A. Hecker submitted into evidence photographs, including Plaintiff's Exhibits 1B, 1H and 1I, showing the decks and stairs for the unit immediately adjacent to her unit and for the two additional units in the same line as her unit.

20. The November 17, 1999 hearing also included testimony that in addition to Mindy A. Hecker's stairs and the three additional stairs in her line of units there are approximately four to six units in the Condominium with decks and stairs closely similar to Mindy A. Hecker's deck and stairs.

21. Thomas Hutchison, a member of the Board of Directors, elected in November 1998 and a resident of the community for approximately four years at the time of the hearing testified at the November 17, 1999 hearing. He stated that general cleaning and maintenance of decks and stairs is the responsibility of the

condominium unit owners who own them, but that major repairs and replacements are the responsibility of the Condominium, and are done at the expense of the Condominium, as a common expense. He further testified that during his tenure, and to his knowledge prior to his tenure as a member of the Board, no stairs to a deck have been requested and/or approved by a Board of Directors which was not developer controlled.

22. The testimony at the November 17, 1999 hearing was that the Kenwood Forest Condominium, II project is now approximately 19-20 years old. No testimony was produced by either party as to when the decks and stairs in the same line as Mindy A. Hecker's deck and stairs were approved, or whether they were approved by a developer controlled or resident controlled Board.

23. The posture of this case therefore is that the stairs were approved by default, that approval expired, no new application was filed, the stairs were constructed without approval, the Board ordered them to be removed, the parties discussed, but never consummated settlement; when the stairs were not removed, the Board, after a hearing as required by the Maryland Condominium Act and its By-laws, voted to direct Mindy A. Hecker to remove the stairs and to impose a fine. This Complaint followed.

CONCLUSIONS OF LAW

The Complaint raises the following issue:

Was the decision of the Condominium Board of Directors after its hearing on April 15, 1999 to direct Mindy A. Hecker to remove the stairs to her deck no later than Monday, May 3, 1999 and to assess a fine of \$25.00 per day for each day the stairs remained in place beginning May 4, 1999 reasonable?

The standard of review of the action of the Condominium in this case is the reasonableness test set forth in Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430 (1957). In that case, the Court of Appeals of Maryland held that the refusal to approve the external design or location of an architectural modification would have to be based upon a reason that bears some relation to the other buildings in the community or to the general plan of development and that the refusal would have to "be a reasonable determination made in good faith, and not high-handed, whimsical or capricious in manner." 128 A.2d at 434.

The Panel reaches the following conclusions of law.

1. Mindy A. Hecker's original application to construct the stairs on the general common elements was approved by default when the Board of Directors failed to take action on her application within sixty (60) days of the filing of a complete application.

2. Mindy A. Hecker's approval expired when she failed to commence construction within six (6) months from the date of approval. Her construction of the stairs thereafter was without approval.

3. The discussions, offers, and counteroffers between the parties after the stairs were constructed were settlement negotiations, but no formal settlement was ever reached. In particular, the Condominium never approved the stairs after the original approval expired or after the stairs were constructed without approval.

4. The decision of the Condominium Board to direct Mindy A. Hecker to remove the stairs to her deck, or face a daily fine, was unreasonable. The Panel reaches this conclusion considering the Complainant's specific stairs in their specific location in relation to the other units which are contiguous to her property, in particular the three sets of stairs in her line of units which are virtually identical to the Complainant's stairs. The facts and circumstances of this particular architectural modification or change, namely the stairs, in this specific location in the community, are unique. As a result, the decision on these facts would not likely serve as a precedent in other locations or for other situations in the community. The Panel also considers that the Board allowed Mindy A. Hecker's stairs to be approved by default once and perhaps twice, and that her deck, with stairs was approved for the previous owner of her property, although the stairs were not constructed. The reason the previous owner did not construct the stairs, according to the testimony, was that he felt they would pose a safety hazard for his young children.

5. When the stairs to the deck are considered in relation to the surrounding architectural modifications, specifically to other similar, virtually identical stairs, in the immediate vicinity of Mindy A. Hecker's unit, and when the prior approvals of these stairs, either by default, or, in the case of the previous owner not by default, are considered, then the decision of the Board to order the removal of Complainant's stairs was unreasonable.

6. Mindy A. Hecker has violated the Condominium By-laws by failing to construct the stairs within the required period of time under her prior written approval. While she must correct this violation by filing an appropriate application, in the context of the factual setting of this case, that violation is de minimus.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 3rd day of January, 2000 ordered that:

1. The decision of Kenwood Forest Condominium, Inc. directing Mindy A. Hecker to remove the stairs to her deck and to fine her for each day the stairs remain in place is reversed.

2. Mindy A. Hecker is ordered to refile her application for the stairs to her deck with the Condominium within 30 days from the date of this order.


3. The Condominium may impose reasonable conditions upon Mindy A. Hecker regarding the stairs, except for the imposition of attorney's or other expert fees. The Panel calls to the parties' attention that Mindy A. Hecker has already expressed her willingness to be responsible for the construction, repair, maintenance and replacement of the stairs and for a period of two years, to be responsible for any damage to the adjacent holly trees that might manifest itself within that period of time which might result from the construction of the stairs (this is not a general assumption of responsibility for the well-being or replacement of those trees), and that she has expressed a willingness to modify the guardrail on the stairs to conform it to the existing stairs in her line of units.

4. Any conditions imposed by the Board must be reasonable, and approval of the application itself must not be unreasonably withheld or delayed.

5. The Panel specifically declines to award attorney's fees to either party.

Any party aggrieved by the action of this Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure.

The decision of the Panel is unanimous.


John F. McCabe Jr., Panel Chair
Commission on Common Ownership
Communities